Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

ORLEAN HOPKINS; JERRY DEWAYNE STANCILL; YOLANDA DELYNN STANCILL; and MELBA LAZENBY-JENKINS, as Administratrix of the Estate of JERRY STANCILL,

Petitioners,

v.

MARC ANDAYA; CITY OF OAKLAND, CALIFORNIA; and GEORGE T. HART,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a 42 U.S.C. §1983 suit arising from the fatal shooting of an unarmed black man by a white police officer the Ninth Circuit reversed a summary judgment. On remand, after trial, the jury returned a defense verdict. The questions presented are:

1. Whether the admission of extrinsic evidence of the decedent's medical history and of an event occurring ten years before the fatal shooting under Rule of Evidence 404(b), without first assessing the probative value of such evidence against its potential for unfair prejudice under Rule of Evidence 403, is harmless error?

2. Whether the denial of discovery into police reports of the officer's misconduct, where the reports have been improperly withheld by the police defendants until one business day before trial, is an abuse of discretion resulting in substantial prejudice?

3. Whether the trial court's failure to instruct the jury, as suggested by a Court of Appeals order on remand, that the excessive force standard must be applied twice, once to each of two separate shootings which led to decedent's death, is reversible error?

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum of the court of appeals [Appendix A, infra] is unreported. The opinion of the court of appeals reversing the district court's grant of summary

judgment in 1992 [Appendix B, infra] is reported at 958 F.2d 881.

JURISDICTION

The court of appeals entered its judgment on August 1, 1994. [Appendix C, infra]. Petitioners' Petition For Rehearing And Suggestion For Rehearing En Banc was denied on September 22, 1994. [Appendix D, infra]. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF EVIDENCE INVOLVED

This case involves the Fourth Amendment to the United States Constitution, 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343, as well as Federal Rules of Evidence 403 and 404(b). [Appendix E, infra].

STATEMENT OF THE CASE

A. INTRODUCTION.

This is a civil rights action arising out of the fatal shooting of a black male by a white police officer on May 21, 1984, in Oakland, California. The decedent was unarmed, had committed no crime, had no criminal record and had been stopped twice before on the night of the incident by the same police officer and found to be harmless. The police officer shot the decedent five times,

reloaded, retreated then shot him four more times, killing him.

The decedent's family sued the officer, the chief of police and the City of Oakland in 1987. Trial was set for September 12, 1988. The police officer requested a delay and the district court reset trial for July 3, 1989, then on its own motion reset, again, for August 7, 1989. The defendants moved for summary judgment, which was granted on July 21, 1989. Summary judgment was reversed on March 24, 1992, by opinion of the court of appeals reported at 958 F.2d 881.

On remand the case was set for trial on January 4, 1993, more than four years after the original trial date. The trial court did not issue a written pretrial order. The case was tried to a jury January 6 through January 22, 1993, and resulted in a defense verdict. Judgment was entered on January 28, 1993, from which a timely appeal was taken.

B. FACTS.

The decedent, Jerry Stancill, was a 34-year-old black man, 5 feet ll inches and 224 pounds. Defendant, Officer Marc Andaya, is white, and, at the time of the killing, was 23 years old, 6 feet 1 inch and 190 pounds. On May 21, 1984, around 9:30 p.m., Andaya responded to a call that Stancill was creating a disturbance at the Capri Motel, where, until that day, Stancill had been living. When Andaya arrived Stancill was on the second floor of the motel and complied with Andaya's request that he descend to the street level. Andaya frisked Stancill, found

that he was unarmed, determined that he had no probable cause for an arrest, and sent Stancill on his way.

Shortly thereafter, Officer Gaston arrived at the scene and he and Andaya together detained Stancill a second time. Andaya reported to Gaston that Stancill was "a little goofy." The two officers agreed that Stancill posed no threat to himself, to the officers, or to the safety of others, and they released him. After releasing Stancill, the officers remained at the scene talking before Gaston drove away. Andaya remained in his parked police car at the well-illuminated intersection of West Street and MacArthur Boulevard, near the Capri Motel and an Arco gas station.

Minutes later, Andaya heard Stancill howling and saw him raise his shirt exposing his chest before beginning to cross West Street in the direction of the motel. Andaya decided to stop Stancill again. He made a radio call for Gaston to return as a cover unit, but not on an emergency basis. Without waiting for Gaston, Andaya drove his car onto an abandoned lot at the intersection, beeped his siren, flashed his spotlight on Stancill, and drove up to him on the sidewalk, approaching from the rear.

According to Andaya's testimony, he exited his car and told Stancill to approach. Stancill went over to the police car, leaned on it, assumed a frisk position, and asked, "Do you want to frisk me?" Andaya did not frisk him. While still in the frisk position on the front of the car, Stancill asked Andaya twice, "What are you going to do?"

From that point there was conflicting evidence of what happened. It is undisputed, however, that Andaya drew his long baton and struck the first blow, hitting Stancill on the arm or hand. Gregory Lassonde, a white witness who knew neither Stancill nor Andaya, stopped for a traffic signal at the intersection and saw Stancill's hands on the front of the police car. Lassonde described Stancill and Andaya engaging in a "dance" in which Andaya backed away and Stancill walked after him with his arms "stiffly at his side." Andaya made several swinging motions with the baton. As Andaya retreated he slipped and fell backwards and, according to Lassonde, Stancill bent over the fallen officer but never struck him or had possession of the baton. According to Lassonde, after falling to the ground, Andaya immediately began to shoot, firing six shots at Stancill. Five bullets struck Stancill. By the time of the sixth shot, Andaya was standing.

Andaya's account is different. He claims that Stancill got control of his long baton and struck him between ten and twenty times. Andaya testified that he tried to fend off blows but was hit "a couple of glancing blows to the head," was struck on the hands, hit on the legs, hit on the elbow, saw and felt the baton hit him, and was struck in the back "numerous times." Andaya said he was "fighting for my life," and that "I would be kicked, hit, kicked, hit . . . I was just covering up a lot of times. . . . "

After the first shooting, Andaya backed away from Stancill and then began to run away. He used his radio to call for help then discarded the radio. He discharged the spent cartridges from his revolver and reloaded. He crossed MacArthur and entered the Arco station. Andaya said Stancill was unarmed.

Stancill walked slowly after Andaya. He had nothing in his hands. He was bleeding profusely from the five bullet wounds inflicted by Andaya and his shirt was stained with blood. As Stancill walked into the Arco station Andaya retreated behind a parked car. When Stancill approached, there were avenues of retreat open to Andaya but he chose not to take them. Andaya shouted to Stancill to stop or he would shoot. When Stancill was approximately 12 to 15 feet from Andaya, the officer held his revolver with both hands in front of his body and fired four more bullets into Stancill, killing him. In all, nine bullets entered Stancill's body, two in the face, five in the torso, and one in each hand.

Immediately after the incident, Andaya was taken to a nearby hospital. Dr. McAmis, the emergency room physician who examined and treated Andaya, stated in his written report that the patient [Andaya] told him he was involved in "an altercation," but did not say that he was involved in a killing or that he had been struck or kicked. The medical report, prepared on the night of the incident, stated that:

"The patient is alert and oriented."

"There is no tenderness or deformity over the facial bones or the skull. . . . over the cervical, thoracic spine . . . . over the ribs or pelvis. . . . over the bones of the forearm."

"There is no deformity or limitation of motion at the elbow."

Dr. McAmis' diagnosis was: "Superficial laceration of the right forearm. Contusion of the left elbow, the lower

back and the left upper leg." The patient was discharged with instructions to ice his elbow that night.

C. EVIDENTIARY RULINGS AT TRIAL AND PROCEEDINGS BELOW.

The issue at trial, as the judge stated at the pretrial hearing was, simply, "what happened that night. Whether a reasonable officer would have acted in the manner [Andaya] acted." Nonetheless, the judge allowed to be admitted highly prejudicial extrinsic evidence.

Plaintiffs made a motion *in limine* to exclude evidence of Stancill's psychiatric history, including any mention of a 1973 incident in which he struck his infant daughter and bit off a testicle of his infant son; the incident resulted in Stancill's commitment to a mental hospital. The court acknowledged the danger of unfair prejudice if the evidence were admitted, stating that "the prejudicial value outweighs its relevancy" and granted the motion to exclude. However, the court reversed itself, *sua sponte*, at the beginning of trial and the evidence was admitted. As a result, Jerry Stancill was presented as a violent, bestial man, although in the years preceding his death he had loving relationships with his children and family and no history of violence. In all, 227 pages of direct testimony of prior acts and the medical history of the decedent were admitted without any limiting instruction and defense counsel emphasized what they termed the "testicle incident" in statements to the jury.

On the other hand, the trial court excluded evidence of citizen complaints against Andaya for excessive force and racial epithets. The court denied discovery of a police

disciplinary report improperly withheld in violation of a magistrate judge's order to disclose, which described Andaya's violent propensities, misconduct, and lack of fitness for duty. The trial court also refused to instruct the jury that there were two shootings separated by time and space requiring two separate applications of the excessive force standard.

On appeal, the Ninth Circuit panel found that the "district court erred in admitting" evidence of Stancill's prior acts and medical history but that the error did "not merit reversal, because we conclude after examining the record in detail that admission of this evidence was *not* 'more probably than not the cause of the result reached by the jury.' *Jaurequi*, 852 F.2d at 1133."

The Ninth Circuit found that although "citizens' complaints may be relevant in §1983 actions, they were not relevant here because the Oakland Police Department investigated the complaints and concluded they were unfounded." This finding was erroneous in that one of the complaints, for choking and threatening to kill a manacled prisoner in 1985, resulted in Andaya's suspension from the police force and in the monetary settlement of a related §1983 suit. Moreover, several of the complaints were the subject of comment in the police report improperly withheld with respect to which the trial court denied discovery.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit decision conflicts with *Wallace v. Mulholland*, 957 F.2d 333 (7th Cir. 1992), which holds that

in a suit against police for excessive force, evidence of the medical history of the victim is not admissible to prove his actual behavior at the time of the alleged civil rights violation. The admission of such evidence unfairly shifts the focus at trial from the victim's actions to his medical condition.

The Ninth Circuit decision also conflicts with *Huddleston v. United States*, 485 U.S. 681 (1988), requiring the trial court to make an assessment under Rule of Evidence 403 to determine whether the probative value of similar acts evidence is substantially outweighed by its potential for unfair prejudice before admitting such evidence.

This case presents a timely opportunity to provide guidance in the conduct of trials to vindicate the civil rights of victims of police misconduct. In addition, the decision below is erroneous, and the issues that it addresses are important.

I. THE NINTH CIRCUIT'S DECISION THAT ADMISSION OF THE MEDICAL HISTORY OF A VICTIM OF POLICE BRUTALITY TO PROVE THE VICTIM'S CONDUCT IS HARMLESS ERROR CONFLICTS WITH THE SEVENTH CIRCUIT'S DECISION IN *WALLACE V. MULHOLLAND* AND NEGATES TRIAL RIGHTS GUARANTEED BY RULE OF EVIDENCE 403.

In *Wallace*, the Seventh Circuit faced the same issue as the Ninth Circuit did in this case, except that the appeal was from a ruling to exclude the psychiatric history and expert testimony about the medical condition of the victim of police misconduct, rather than an erroneous

ruling to admit such evidence. The circumstances of the two cases were similar: the police were called to deal with a mentally disturbed black man who was unarmed, had committed no crime, and was subdued after a confrontation initiated by the police. However, the results were different. Michael Wallace suffered minor injuries but Jerry Stancill was repeatedly shot and killed.

Judge Wisdom, Senior Circuit Judge for the Fifth Circuit, sitting by designation, wrote the opinion for the Seventh Circuit in *Wallace.* Explaining why the trial court correctly granted a motion *in limine* to prevent a medical expert from testifying and to exclude evidence of the victim's medical history as "probably irrelevant, and certainly prejudicial," Judge Wisdom said:

> "The subject of that case was Michael's actual behavior, and the way the police officers responded to it. The subject was not a psychiatric prediction about how someone *like* Michael might have behaved. Such evidence, together with evidence about Michael's specific actions in the past, would have over-emphasized the likelihood that Michael acted in a manner that justified the officers' reaction." 957 F.2d at 336 [Emphasis in original.]

In contrast, in the Stancill case, the trial court denied the plaintiffs' motion *in limine* to prevent medical experts from testifying and to exclude evidence of the victim's medical history. Instead, the court allowed expert testimony and defense attorney argument on Stancill's medical history, which when transcribed ran to 227 pages.

The court of appeals acknowledged the trial court error, stating that the type of evidence erroneously admitted was "precisely the type of evidence Rule 404(b) seeks to exclude. *See Huddleston v. United States,* 485 U.S. 681, 686 (1988)." But it did not reverse. Nor did the court of appeals apply *Huddleston,* though it referred to it. In *Huddleston,* this Court said in dictum:

> "We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). . . . We think, however, that the protection against such unfair prejudice emanates . . . from four . . . sources: [one of which is] from the assessment the trial court *must* make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice. . . . " 485 U.S. at 691 (Emphasis added.)

Huddleston states that the trial court must make an assessment under Rule 403 before admitting similar acts evidence that has potential to be unfairly prejudicial. *Id.*

The trial court in this case initially seemed to understand its obligation to make the assessment required by Rule 403 when it ordered the exclusion of medical history evidence because its "prejudicial value outweighs its relevancy." However, the court reversed itself, *sua sponte,* without reference to or regard for Rule 403. Reviewing the trial court ruling to admit the extrinsic evidence, the court of appeals cited *Huddleston,* then it, too, ignored the *Huddleston* mandate that Rule 403 be applied to protect against unfair prejudice, concluding that the error was harmless. As a result, the court of appeals decision directly conflicts with the Seventh Circuit decision in

Wallace, ignores the essential mandate of *Huddleston,* and ignores the protections for a fair trial guaranteed by Rules of Evidence 404(b) and 403.

Leading jurists and scholars recognize the difficulty of getting a fair trial when police are adversaries. Thus, Justice Thurgood Marshall commented on "the apparent prevalence of police perjury" in *Briscoe v. LaHue,* 460 U.S. 325, 365 (1982); Irving Younger described "The Perjury Routine" in drug "dropsy" cases in which "policemen are committing perjury . . . perhaps in nearly all of them." *The Nation,* May 8, 1967, page 596; Ninth Circuit Judge Stephen Reinhardt expressed concern for "civil rights plaintiffs who once again are the object of hostile and discriminatory treatment by the federal courts." *Elder v. Holloway,* 984 F.2d 991, 1000 (9th Cir. 1993); David Rudovsky described the barriers to judicial vindication of the rights of victims of police misconduct, "Police Abuse: Can the Violence Be Contained?" 27 *Harvard Civil Rights-Civil Liberties Law Review* 465, 466-468 (1992); and Ninth Circuit Judge Alex Kozinski observed that

> "Deadly force cases pose a particularly difficult problem . . . because the officer defendant is often the only surviving eyewitness. Therefore, the judge must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story – the person shot dead – is unable to testify." *Scott v. Henrich,* 34 F.3d 1498, 1502 (9th Cir. 1994).

If the Rules of Evidence are not observed by trial judges in civil rights actions there is little chance that civil rights will be vindicated in federal courts. This

Court can provide necessary guidance in the conduct of civil trials by reviewing the issues here presented.

II. THE COURT OF APPEALS APPLIED THE WRONG STANDARD FOR REVERSIBLE ERROR; THIS COURT SHOULD PROVIDE GUIDANCE AS TO WHEN RULE 403 ERROR IS REVERSIBLE.

The Ninth Circuit acknowledged the trial court error but dismissed it as harmless, citing *Jaurequi v. City of Glendale,* 852 F.2d 1128 (9th Cir. 1988). *Jaurequi,* an employment discrimination suit, involved the exclusion of cumulative testimony having no potential for unfair prejudice. The harmless error standard enunciated in *Jaurequi,* therefore, has no application to this case. As discussed above, once having failed to make the assessment required by Rule 403, the trial court error was unfairly prejudicial.

In the absence of Supreme Court precedent defining the scope of reversible error, the court of appeals should have followed Ninth Circuit precedent. If it is assumed that the trial court did make an assessment under Rule 403, albeit a silent or private assessment which was not articulated in any findings, then its evidentiary ruling must be judged according to the "tainted verdict" standard of *Kisor v. Johns-Manville Corp.,* 783 F.2d 1337, 1340 (9th Cir. 1986) or the "affected substantial rights" standard of *Cohn v. Papke,* 655 F.2d 191 (9th Cir. 1981).

The court of appeals should have followed the *Cohn* case involving a §1983 action similar to this case. In *Cohn,* the trial court was reversed for admitting testimony and psychiatric reports of past sexual practices where the

underlying arrest leading to a claim of excessive force, was based on the alleged solicitation of homosexual acts. The *Cohn* court held that the evidence was not admissible under Rule 404 because "the evidence of Cohn's past sexual experiences takes the focus of the jury away from the question of what actually happened that night and puts it on the character of the individual." 655 F.2d at 194. That is precisely the reason given by the Seventh Circuit in *Wallace v. Mulholland, supra,* for excluding the medical history of the victim. The *Cohn* court stated that even assuming such evidence was admissible under Rule 404 it would have to be excluded under Rule 403 because

> "This evidence was of very slight probative value, and the tendency for prejudice was great. There was a clear potential that the jury may have been unfairly influenced by whatever biases and stereotypes they might hold with regard to homosexuals or bisexuals. . . . " 655 F.2d at 194.

The error of the court of appeals in this case in failing to follow *Huddleston* or to apply the correct standard for harmless error is particularly perplexing since each of the two Ninth Circuit judges who sat on the panel authored decisions in recent criminal cases in which *Huddleston* was correctly applied.

In *U.S. v. Mayans,* 17 F.3d 1174, 1183 (9th Cir. 1994), Judge Fletcher wrote: "The Supreme Court, moreover, has emphasized the importance of a Rule 403 analysis in Rule 404(b) cases. *Huddleston v. United States,* 485 U.S. 681, 691 (1988)." In *State of Arizona v. Elmer,* 21 F.3d 331, 336, Judge Trott referred to Rule 403 after acknowledging the applicable standard for the admissibility of "extrinsic acts"

evidence to be that "the evidence may be accepted only if, on balance, its probative value is not substantially outweighed by the danger of unfair prejudice to the defendant."

The court of appeals error in this case dramatizes the need for this Court to remove any uncertainty that Rule 403 applies to civil cases, as well as to criminal, and that failure to make the required assessment or to articulate the findings of such an assessment results in reversible error.

III. DENIAL OF CONTINUANCE FOR DISCOVERY INTO OFFICER MISCONDUCT IS AN ABUSE OF DISCRETION WHERE THE NEED FOR DISCOVERY RESULTS FROM THE IMPROPER WITHHOLDING OF SUCH EVIDENCE BY DEFENDANTS.

In violation of a court order, the defendants improperly withheld a report containing evidence of the defendant officer's propensity for violence and lack of fitness for duty. On the eve of trial, defendants produced the report causing plaintiffs to seek a one day continuance of trial to take depositions. The trial court denied the discovery request and, at the same time, decided to exclude evidence of the officer's misconduct which was corroborated by the report. The court's decision to exclude the evidence was a *sua sponte* reversal of an earlier ruling.

The trial court's denial of continuance for discovery was an abuse of discretion under *Martel v. County of Los Angeles*, 21 F.3d 940, 943 (9th Cir. 1994). In the context of this case, where the court made a series of evidentiary rulings, each favorable to defendants and unfavorable to

plaintiffs, the error was so prejudicial as to assure that the trial was unfair.

IV. TWO SHOOTINGS, SEPARATED BY TIME AND SPACE, REQUIRE TWO APPLICATIONS OF THE EXCESSIVE FORCE STANDARD.

In reversing a summary judgment in this case, the Ninth Circuit found that there were two shootings requiring two applications of the excessive force standard, *Hopkins v. Andaya*, 958 F.2d 881 at 886-887 (9th Cir. 1992). The law of the case doctrine required the trial court, on remand, to instruct the jury that the two separate shootings required dual application of the excessive force standard. Plaintiffs requested such an instruction but their request was denied. Assuming that an objection would be futile, Plaintiffs did not object.

The court of appeals held that "Plaintiffs did not object to the jury instructions, so we cannot review the propriety of this instruction." Having proposed an alternative instruction on the two shootings, no objection was required and Rule 51 of the Rules of Civil Procedure was satisfied under *Martinelli v. City of Beaumont*, 820 F.2d 1491, 1493-94 (9th Cir. 1987). Additionally, instructions implicit in the order on remand made it plain error for the trial court to fail to instruct the jury to apply the excessive force standard to each shooting.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November, 1994

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ORLEANS HOPKINS, individually; MELBA LAZENBY-JENKINS, as Administratix of the Estate of Jerry Stancill Plaintiffs-Appellants, v. MARC ANDAYA; CITY OF OAKLAND, CALIFORNIA; GEORGE T. HART, Defendants-Appellees.	No. 93-15463 D.C. No. CV-87-2470-SC MEMORANDUM* (Filed Aug. 1, 1994)

Appeal from the United States District Court
for the Northern District of California
Samuel Conti, District Judge, Presiding

Argued and Submitted April 14, 1994
San Francisco, California

Before: FLETCHER and TROTT, Circuit Judges, and KING,** District Judge.

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**The Honorable Samuel P. King, Senior District Judge for the District of Hawaii, sitting by designation.

Oakland police officer Marc Andaya killed Jerry Stancill. Stancill's mother and his two children filed this § 1983 suit against Officer Andaya, Police Chief George Hart, and the City of Oakland. The case was tried before a jury, which entered a verdict for defendants. Plaintiffs appeal on various evidentiary grounds. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I

Denial of Continuance for Further Discovery

"The district court's decision to grant or deny a continuance will not be overturned except upon a showing of clear abuse of discretion." *Sablan v. Department of Finance*, 856 F.2d 1317, 1321 (9th Cir. 1988) (denial of continuance in order to conduct discovery is essentially a denial of discovery); *accord United States v. Bourgeois*, 964 F.2d 935, 937 (9th Cir.), *cert. denied*, 113 S. Ct. 290 (1992).

> In determining whether a district judge abused his or her discretion in refusing to grant a continuance, our precedents require us to consider four factors: the appellant's diligence in attempting to prepare his case for the originally scheduled trial date; the likelihood that the grant of a continuance would have resolved the problem which led the appellant to seek a continuance; the inconvenience a continuance would have caused the court and the opposing party; and the extent to which the appellant might have suffered harm as a result of the district court's denial.

Martel v. County of Los Angeles, 21 F.3d 940, 943 (9th Cir. 1994). Although the court must weigh these factors

against one another, "we will not reverse absent a showing of prejudice." *Id.*

Appellants' diligence is not disputed. The June memos fell within the perimeters of their 1988 production request, so defendants should have produced them. Even though the motion was made four days before trial, a one-day continuance would not have greatly inconvenienced the court or the opposing party. Nevertheless, appellants have not shown that granting the continuance would have "resolved the problem which led [them] to seek the continuance."

Even if the factors weighed in appellants' favor, we would not reverse. Appellants have not sufficiently shown (including responses to questioning at oral argument) that denial of the continuance resulted in actual and substantial prejudice to them. *See Sablan*, 856 F.2d at 1321. At least one of the officers mentioned in the June memos – Sergeant Moschetti – was on plaintiffs' witness list, but plaintiffs did not call him to testify about the memos or the other officers' complaints. Plaintiffs cannot establish that the court's denial of the continuance prejudiced their case.

II

Evidentiary Rulings

Evidentiary rulings are reviewed for an abuse of discretion and will not be reversed absent some prejudice. *Jauregui v. City of Glendale*, 852 F.2d 1128, 1132 (9th Cir. 1988). "To show reversible prejudice a party must

demonstrate that the allegedly erroneous evidentiary ruling more probably than not was the cause of the result reached by the court." *Id.* at 1133.

A. Evidence of Stancill's Prior Acts and Medical History

The district court admitted evidence of Stancill's prior acts and expert testimony concerning his psychiatric history under Federal Rule of Evidence 404(b), because it tended to show the nature of Stancill's behavior when he was off his medication. Although determining the initiator of the May 21, 1984 incident was material, *see United States v. Pitts*, 6 F.3d 1366, 1370 (9th Cir. 1993); *United States v. Bibo-Rodriguez*, 922 F.2d 1398, 1400 (9th Cir.), *cert denied*, 111 S. Ct. 2861 (1991), the only way evidence of Stancill's specific acts could be probative is if Stancill acted in conformity with his prior behavior. This is precisely the type of evidence Rule 404(b) seeks to exclude. *See Huddleston v. United States*, 485 U.S. 681, 686 (1988) ("The threshold inquiry a court must make . . . is whether that evidence is probative of a material issue *other than character.*"); *Arizona v. Elmer*, 21 F.3d 331, 335-36 (9th Cir. 1994); *Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1335 (9th Cir. 1985). The district court erred in admitting this evidence.[1] Nevertheless, this error does not merit

[1] The district court also suggested this evidence would be admissible to impeach Stancill's children's testimony, *see* Fed. R. Evid. 404(a) (3) & 608(b), but 608(b) does not envision using evidence of specific instances of another's conduct to impeach a witness; it only discusses using specific instances of a witness' conduct. *See* Fed. R. Evid. 608(b). This evidence was inadmissible under Rules 404(a) (3) and 608(b).

reversal, because we conclude after examining the record in detail that admission of this evidence was *not* "more probably than not the cause of the result reached by the jury." *Jauregui*, 852 F.2d at 1133.

B. Andaya's record

1. Andaya's record of citizens' complaints

Citizens' complaints may be admitted to show municipal liability or to show a police chief's liability. *See Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991). In such cases, Federal Rule of Evidence 404(b) does not preclude the introduction of complaints, because the complaints are not used to prove the individual's previous conduct but to prove the city's or the police chief's knowledge. Although citizens' complaints may be relevant in § 1983 actions, they were not relevant here because the Oakland Police Department investigated the complaints and concluded they were unfounded.

2. Andaya's performance reviews and subsequent misconduct

Appellants argue Andaya's subsequent acts are relevant to show municipal liability. The Ninth Circuit has joined other circuits in stating that a "jury properly could find . . . policy or custom from the failure of [a police chief] to take any remedial steps after the violations." *Larez*, 946 F.2d at 647; *accord McRorie v. Shimoda*, 795 F.2d 780, 783-84 (9th Cir. 1986). However, in the instant case, plaintiffs apparently abandoned their claims that there was a municipal policy or custom to use excessive force.

On direct examination Charles Bates, plaintiffs' expert witness, did not testify concerning municipal policy or custom. Plaintiffs presented no other evidence showing municipal policy or custom, and their remaining claims against the City were based solely on the City's inadequate training and Police Chief Hart's failure to terminate officer Andaya. Thus, the court's refusal to admit evidence of Andaya's subsequent acts does not warrant reversal.

Appellants also argue evidence of Andaya's subsequent acts was relevant to impeach testimony that, after the May shooting, Andaya's performance improved. Andaya's credibility is an important issue, and Federal Rule of Evidence 607 permits a party to inquire into specific instances of conduct to impeach the credibility of a witness on the stand. *See* Fed. R. Evid. 607(b). However, the specific instances must be probative of *truthfulness.* The evidence was not admissible for impeachment purposes.

C. The Hearsay Statement

Appellants argue Andaya's statement – "he got my baton, Sarge" – should not have been admitted as an excited utterance because enough time had passed to give Andaya an opportunity to fabricate, and the statement lacked the spontaneous unreflective quality necessary to justify the exception. "We review the district court's decision to admit evidence over a hearsay objection for abuse of discretion." *Larez,* 946 F.2d at 641.

For Rule 803(2) to apply, the declarant's statement must be a spontaneous reaction to the event and not the result of reflective thought. *Guam v. Ignacio*, 10 F.3d 608, 615 (9th Cir. 1993); *United States v. McLennan*, 563 F.2d 943, 948 (9th Cir. 1977), *cert. denied*, 435 U.S. 969 (1978); *see also Idaho v. Wright*, 497 U.S. 805, 820 (1990). To determine this, we consider factors such as the amount of time that elapsed between the event and the declaration, and whether the declarant spoke to anyone in the interim. *See United States v. Sherlock*, 962 F.2d 1349, 1365 (9th Cir. 1989), *cert. denied*, 113 S. Ct. 419 (1992); *United States v. Nick*, 604 F.2d 1199, 1202 (9th Cir. 1979); *United States v. Napier*, 518 F.2d 316, 318 (9th Cir.), *cert. denied*, 423 U.S. 895 (1975).

The record indicates that Sergeant Martin arrived on the scene 3 to 4 minutes after Andaya made the 940-B call. It is unclear precisely how much time passed between the shooting and Andaya's statement. Appellants argue enough time passed for Andaya to have the opportunity to speak with others, but appellants present no evidence that Andaya actually did so. The district court did not abuse its discretion by admitting Andaya's statement.

III

The proposed jury instruction

Appellants argue the district court's failure to give an excessive force instruction requiring the jurors to evaluate the incident as two separate uses of force violates the law-of-the-case doctrine. "In a civil case, we may not review a jury instruction in the absence of a proper

objection." *Larez*, 946 F.2d at 638. Plaintiffs did not object to the jury instructions, so we cannot review the propriety of this instruction.

IV

Reassignment

Because we affirm the district court judgment, we need not consider appellants' request to assign this case to a different judge on remand.

We AFFIRM the district court's judgment.

APPENDIX B

Orlean HOPKINS, Individually, and Melba Lazenby-Jenkins as Administratrix of the Estate of Jerry Stancill, Plaintiffs-Appellants,

v.

Marc ANDAYA, George T. Hart, and the City of Oakland, Defendants-Appellees.

No. 89-16368.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted March 12, 1991.

Decided March 5, 1992.

As Amended March 24, 1992.

Civil rights action and wrongful death claim was brought on behalf of person who was shot nine times by police officer against police officer, chief of police and city. The United States District Court for the Northern District of California, Samuel Conti, J., granted summary judgment in favor of the defendants, and plaintiffs appealed. The Court of Appeals held that material issues of fact precluded granting summary judgment in favor of defendants.

Reversed and remanded.

Thomas H. Crawford, San Francisco, Cal., for plaintiffs-appellants.

Karen A. Silverstein, Asst. City Atty., Jayne W. Williams, City Atty., Oakland, Cal., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before D.W. NELSON, KOZINSKI and T.G. NELSON, Circuit Judges.

PER CURIAM:

On the night of May 21, 1984, Marc Andaya shot and killed Jerry Stancill. Appellants Orlean Hopkins, the mother of the decedent and Melba Lazenby-Jenkins, Stancill's daughter, brought this action, alleging claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1988 and the California wrongful death statute. Hopkins and Lazenby-Jenkins appeal the summary judgment granted in favor of defendants/appellees, Marc Andaya, the City of Oakland, the Oakland police department and its police chief. We reverse and remand the district court's grant of summary judgment and its decision to dismiss appellants' pendent California wrongful death claims.

I. Facts

Oakland Police Officer Marc Andaya responded to a call on the night of May 21, 1984 reporting that Jerry Stancill was creating a disturbance at the Capri Motel.[1] Because Stancill had allegedly threatened "to shoot the place up," Andaya searched Stancill and determined that he was unarmed. He then sent Stancill on his way.

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[1] Much of the factual description that follows is taken from the testimony of Officer Andaya, a witness with an obvious interest in the outcome of this case.

During this encounter, Andaya observed Stancill acting strangely and talking to himself in an illogical manner. He and a fellow officer followed Stancill and stopped him to determine whether Stancill should be detained for a psychiatric evaluation in accordance with California law. The officers did not detain Stancill because they did not feel that he posed "a threat to himself or others."

A short time later, Andaya was completing paperwork in a parking lot when he heard Stancill "howling or braying" under a traffic light. When Stancill began to walk back towards the Capri Motel, Andaya pulled his car into an abandoned lot behind Stancill and sounded his siren. Stancill then approached the car.

According to Andaya, Stancill put his hands on the police car in a frisk position, and asked "what are you going to do?" Andaya claims that Stancill's manner then changed: he became hostile and began approaching Andaya in a threatening manner. Andaya testified that he backed away, and drew his baton and began hitting Stancill's arms to keep him away. Andaya then says that Stancill grabbed Andaya's baton and caused him to fall backwards and hit his head on the ground. Andaya says this blow was sufficiently hard to "daze" him.

According to Andaya, Stancill then hit him with the baton "at lest ten times" in spite of Andaya's efforts to evade the blows. Andaya claims that after a minute or so of repeated blows and kicks to the head or body, he drew his revolver and warned Stancill to stop. Stancill kept attacking, so Andays shot at him six times at a range of three to four feet in several spaced volleys.

Andaya testified that he knew the shots had hit Stancill, since he saw blood and told Stancill "You're hurt. Don't get up." However, he also stated that the shots did not stop Stancill from coming at him. He then managed to bring Stancill to the ground and wrestled with him for about a minute. Andaya then claims he managed to get up and back away, but that Stancill got up as well. With Stancill advancing on him, Andaya claims that he somehow managed to radio for help, throw the radio down, empty the spent cartridges from his revolver and reload it, cross the street and hide behind a car in a gas station on the other side of the street. One again Stancill advanced on Andaya. After warning Stancill again to stop, Andaya fired four more bullets at close range. Andaya says that Stancill was still standing after the four shots were fired. Andaya does not remember anything else until he was lifted into an ambulance.

Jerry Stancill died from nine gunshot wounds: two to the head, five to the torso and one in each hand. The report of the doctor who examined Andaya the night of the shooting indicated that he had bruises on his arms, back, and legs, but not on his head. The medical report also indicated that Andaya's injuries were not serious.

The declaration of an eyewitness, Greg Lassonde, contradicts Officer Andaya's testimony in important respects. According to Lassonde, Stancill was indeed pursuing Andaya, and Andaya fell or was pushed backwards. Stancill then leaned over Andaya and began grabbing at him with his hands. According to Lassonde, however, Stancill at no time had possession of the baton and did not hit Andaya with it. Instead, Andaya began firing almost immediately after he fell, without issuing a

warning. Lassonde also denies that the two wrestled on the ground after Andaya fired the first six shots. Instead, he claims that Andaya was standing by the time he fired the last shot in the first volley.

Andaya has a history of citizen complaints of excessive force, a reputation for being quick-tempered, and has been at the center of several incidents involving inappropriate use of his firearm.

Appellants, decedent's mother and daughter, filed this action on May 20, 1987, alleging violations of 42 U.S.C. § 1983 and Cal.Code Div.Procedure § 377 (wrongful death). Appellees filed a motion for summary judgment on June 2, 1989, relying on the testimony of Officer Andaya and several other members of the Oakland Police Department. Appellants filed their opposition to this motion on June 16, 1989. To bolster their opposition, they attached the medical records and evidence of Andaya's prior and subsequent record in the Department. They did not depose Greg Lassonde, even though he was on appellants' witness list for trail.

Without the benefit of any evidence from Lassonde, the district court granted summary judgment for appellees on the section 1983 claims on July 21, 1989. The court dismissed the California wrongful death claim "for lack of pendent jurisdiction." On August 4, 1989, appellants filed a motion for reconsideration which included for the first time the declaration of Greg Lassonde. The court denied this motion on September 29, 1989, and this appeal ensued.

II. Standard of Review

The court reviews *de novo* a grant of summary judgment. Fed.R.Civ.P. 56; *Kruso v. Int'l Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir.1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. 3217, 110 L.Ed.2d 664 (1990). On summary judgment, the evidence must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

The party moving for summary judgment has the burden of proving the absence of any genuine issue of material fact that would allow a judgment as a matter of law. *Id.*, 477 U.S. at 256, 106 S.Ct. at 2514. The court's function on summary judgment is *not* to make credibility determinations. *Id.*, 477 U.S. at 255, 106 S.Ct. at 2513.[2] The trial judge determines whether the evidence presented is such that a jury applying the evidentiary standard could reasonably find for either the plaintiff or the defendant. *Id.*

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[2] Appellants rely upon Cal.Code Civ.Procedure § 437(c) for the proposition that summary judgment is improper where it relies upon the testimony of a party-defendant. This suit is not in California state court, however. The Federal Rules of Civil Procedure, which govern this litigation in federal court, provide that summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). According to this rule, deposition testimony can be sufficient as a basis for granting summary judgment.

However, once the moving party demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmoving party to produce evidence sufficient to support a jury verdict in her favor. *Id.*, 477 U.S. at 256-257, 106 S.Ct. at 2514-15. In meeting this burden, the nonmoving party must go beyond the pleadings and show "by her own affidavits, or by the depositions, answers to interrogatories, or admissions on file" that a genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

III. Summary Judgment

Apprehension by use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). In *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Supreme Court held:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.
>
> . . . .
>
> The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

490 U.S. at 396-397, 109 S.Ct. at 1872 (citations omitted). In determining whether an officer acted reasonably under the Fourth Amendment, we must consider the "severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*, 490 U.S. at 396, 109 S.Ct. at 1872.

Appellants contend that there is a triable issue of fact as to whether Andaya used unreasonable force against Stancill.[3] The question of the reasonableness of force is usually a question of fact for the jury. However, on summary judgment, the court may make a determination as to reasonableness where, viewing the evidence in the light most favorable to Hopkins, the evidence compels the conclusion that Andaya's use of force was reasonable. In the unusual circumstances of this case, two troubling

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[3] Police officers are entitled to assert a defense of qualified immunity from section 1983 liability if they reasonably believed in good faith that their actions were constitutional. *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir.1981), *cert. denied*, 459 U.S. 829, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982). In Fourth Amendment unreasonable force cases, unlike in other cases, the qualified immunity inquiry is the same as the inquiry made on the merits. *See, e.g., Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir.1991) (defendant in "unreasonable force" case is entitled to qualified immunity if "the totality of the circumstances . . . justified the particular type of seizure"). *Hunter v. District of Columbia*, 943 F.2d 69, 75 (D.C.Cir.1991); *Jackson v. Hoylman*, 933 F.2d 401, 402-03 (6th Cir.1991); *Street v. Parham*, 929 F.2d 537, 540-41 & n. 2 (10th Cir.1991). For this reason, we do not consider the qualified immunity issue separately in this case.

factual issues lead us to conclude that summary judgment is inappropriate.

A. The Medical Evidence

First, the medical evidence in the record undermines Andaya's story in numerous ways. Shortly after the shootings, Andaya was examined by a physician at the emergency room of the Samuel Merritt Hospital in Oakland. The report of that examination makes for informative reading.

The medical report starts with an account of Andaya's statement to the medical staff concerning the cause of his injuries:

> [T]he patient says that he was hit on his head and on his left elbow with a baton. He believes that he was bitten on his right forearm. He also complains of some pain over the right upper leg and the sacral area. He does not believe that he lost consciousness. He has not had any difficulty with vision or nausea or vomiting since the incident.

Andaya's statement to the medical staff conflicts in significant respects with his deposition testimony. To the medical staff he complains only of being hit on the head and left elbow with a baton; in his deposition, he claims there were 10-20 blows to all parts of his body, and that he struck his head when he fell backwards. The medical staff he tells of bites; during his deposition, he says nothing about having been bitten. To the medical staff he says that he does not believe he lost consciousness; in his deposition, he claims he lost consciousness (or nearly lost

consciousness) twice: first, at the time he fell backwards and struck his head in the parking lot ("I might have blacked out for a second as my head hit"), and second, after he shot Stancill the second time in the gas station ("The next person I actually remember is my friend, Michael Hallinan. I was getting into the – the ambulance").

The medical report containing Andaya's statement to the medical staff was submitted by Hopkins in opposition to the motion for summary judgment; it is competent evidence that the district court may consider under Rule 56(c). In determining the threat Andaya really faced, the jury would be entitled to consider the milder version of the altercation contained in the statement Andaya made closer to the time of the incident: that he was hit only once or twice with the baton; that he never hit his head on the ground; that he never passed out.

Given this milder version of the threat Andaya faced, a jury could reasonably conclude that the force he used was excessive. In reaching this conclusion, the jury might well be aided by the substance of the medical report. The report, in its entirety, states as follows:

> Vital Signs: Blood pressure 118/50, temperature 99.7, respiration s 20.
>
> General: *The patient is alert and oriented.*
>
> HEENT: External ocular muscles are intact. Pupils are equal and reactive. Fundi are benign. TMs are clear. *There is no tenderness or deformity over the facial bones or the skull.*
>
> Chest: Clear with breath sounds bilaterally equal.

Heart: Regular rhythm without murmur.

Abdomen: Soft, nontender with active bowel sounds.

Musculoskeletal: *There is no tenderness or deformity over the cervical, thoracic spine.* There is some tenderness over the lower lumbar spine and the sacral area. There is no deformity. *There is no tenderness or deformity over the ribs or the pelvis.*

Extremities: There is a hematoma over the lateral aspect of the left elbow. *There is no deformity or limitation of motion at the elbow.* Distal motor, sensory and pulses are intact. There is a superficial laceration of the right forearm which is approximately 1/2 inch in length. The laceration is superficial and not through all layers of the skin. *There is no tenderness over the bones of the forearm.* Distal motor, sensory and pulses are intact. The left upper leg has a contusion over the lateral aspect. *There is otherwise no tenderness or deformity over the lower extremities. X-Rays of the right forearm, the left elbow and the lumbo-sacral spine, preliminary reading, all negative.*

. . .

DIAGNOSIS: *Superficial laceration of the right forearm. Contusion of the left elbow, the left lower back and the left upper leg.*

DISCHARGE INSTRUCTIONS: *The patient was instructed to ice his elbow tonight,* keep the wound bandaged. He was instructed to see the City Physician tomorrow.

(emphases added). Even without the help of experts, a jury could look at this report and conclude that Officer Andaya was never in any serious danger.

B. The Second Shooting

Andaya, according to his own account, used deadly force not once but twice. The first was in the parking lot where the altercation began. Andaya found himself under attack by Stancill, who had gotten ahold of Andaya's night stick and was using it to hit the officer ten or twenty times over his head, back, shoulders and arms. The second use of force occurred several minutes later in the Arco station, after Andaya had managed to break away following the first shooting.

Andaya's story, even if believed in every particular, would justify his use of deadly force only the first time, where Stancill was allegedly beating him. While we might question the competence of an officer who is disarmed by a single, unarmed, mentally deranged man, we really can't quibble with his use of deadly force to avoid being bludgeoned to death with his own club.

But that is not the crucial shooting, because Stancill was still alive after Andaya emptied his revolver the first time. The critical encounter – the one where Andaya delivered the lethal shot – came later, after what can only be described as a bizarre series of events.

According to Andaya, he managed to break away from Stancill after discharging his weapon; Stancill followed at a brisk pace. The baton – the one that had caused Andaya to fear for his life – was gone:

Q: Did [Stancill] have anything in his hands?

A: No, sir, not that I could see.[4]

Officer Andaya saw blood on Stancill's body and knew he was wounded, since he yelled to Stancill, "You're hurt. Don't get up." He used his radio to call for backups, gave his location, and threw the radio down. He then emptied the spent cartridges from his gun and reloaded using a speed loaded. He crossed MacArthur Boulevard into an Arco gas station. Stancill was still in pursuit but Andaya managed to put a vehicle between himself and Stancill. Stancill still had nothing in his hands, but moved to within a care length of Andaya. Andaya yelled at him to stop and leave him alone, but Stancill kept coming towards him. Andaya then shot Stancill four more times, killing him.

Once Andaya managed to break away from Stancill and pepper him with five bullets, the exigency of the situation lessened dramatically. The officer was holding an empty gun, a police radio and a small baton, any of which could have been used as a defensive weapon. He was being pursued by an unarmed civilian he knew as wounded. The officer had the time (and the presence of mind) to use his radio to "put on my call sign and put out a 40B . . . Officer down and needs help" He had the time and elbow room to empty his revolver and reload it. He managed to cross a major thoroughfare, reach a gas station and put a car between himself and his assailant.

Accepting all of these facts, we cannot say as a matter of law that Andaya acted reasonably when he then shot

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[4] Andaya testified to this point more than once:
Q: At that time, did he have anything in his hands?
A: No, sir.

the unarmed Stancill four more times. At the time of the second shooting, it was far from clear that Andaya reasonably feared for his life. Stancill had been wounded and was unarmed; Andaya was armed with several weapons and could hide behind a car. Andaya had already called for help; he needed only to delay Stancill for a short period of time. He could have evaded Stancill, or he could have attempted to subdue him with his fists, his feet, he baton or the butt of his gun. To endorse Andaya's chosen course of action – firing *four* more shots – would be to say that a police officer may reasonably fire repeatedly upon an unarmed, wounded civilian *even when alternative courses of action are open to him.*[5]

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[5] In reaching this conclusion, we do not rely on the affidavit of Greg Lassonde. Lassonde was listed as a witness to the incident in appellants' pretrial statement. Appellants knew of the witness and could have deposed him or submitted his affidavit to contest the summary judgment motion. Appellants offer no excuse for not presenting the affidavit earlier. A defeated litigant cannot set aside a judgment because he failed to present on a motion for summary judgment all the facts known to him that might have been useful to the court. *See Northwest Acceptance Corp. v. Lynnwood Equip.*, 841 F.2d 918, 925-26 (9th Cir.1988) (district court has discretion not to consider claims not raised until motion for reconsideration); *Schanen v. United States Dept. of Justice*, 762 F.2d 805, 807-08 (9th Cir.1985) (no abuse of discretion to refuse to consider new arguments in Rule 60(b) motion, even though "dire consequences" might result; neglect in failing to respond to summary judgment motion was "inexcusable"), *reaffirmed as modified*, 798 F.2d 348 (9th Cir.1985); *Fay Corp. v. Bat Holdings I, Inc.*, 651 F.Supp. 307, 309 (W.D.Wash.1987) ("Motions for reconsideration . . . are not justified on the basis of new evidence which could have been discovered prior to the Court's ruling;" collecting cases).

C. Conclusion

While these factual conflicts concerning the sequence of events and the true nature of the threat confronting Andaya might be resolved in Andaya's favor of trial, it is neither our job nor the job of the district court to resolve these conflicts in the evidence on a motion for summary judgment. It is true that only Andaya's first-hand testimony was presented. However, circumstantial evidence can speak clearly and often unequivocally; properly construed, it is as objective and reliable as any other evidence. As a great trial lawyer once said, "We better know there is a fire whence we see much smoke rising than we could know it by one or two witnesses swearing to it. The witnesses may commit perjury, but the smoke cannot." Abraham Lincoln, Unsent Letter to J.R. Underwood and Henry Grider, October 26, 1864, *reprinted in The Quotable Lawyer* 323 (1986) (Schrager and Frost eds.). We reverse the grant of summary judgment in favor of Andaya.

We also reverse the grant of summary judgment in favor of Hart and the City. The district court dismissed the claims against the chief of police and the city on the theory that, if Andaya is not liable, neither are they. Because Andaya may be held liable under our disposition of the case, so may the other defendants. In any event, the police chief and city might be held liable for improper training or improper procedure even if Andaya is exonerated, since they put an officer on the street who is so badly trained and instructed he lets his baton be taken away from him and then has to kill an unarmed civilian to save his own life. Andaya has a history of citizen complaints of excessive force, a reputation for being

quick-tempered, and has drawn or fired his gun inappropriately several times before. These facts would certainly bear on whether the city properly trained Andaya, and whether they should have sent him out on the streets carrying a weapon.

IV. Pendent Jurisdiction

Appellants also brought a wrongful death claim under California law. Although appellees did not seek summary judgment on the state wrongful death claim, the district court dismissed the state claim along with the federal claims "for lack of pendent jurisdiction." Because of our disposition of the federal claims, we vacate the dismissal of appellants' state law claims and remand to the district court so that it may determine whether or hear them along with the federal claims at trial.

One factor will complicate the district court's evaluation on remand. The statute of limitations for actions under Cal. Code Civ.Procedure § 377 is generally one year. Cal.Code Civ.Procedure § 340. Because this action was filed on May 20, 1987, nearly three years after Jerry Stancill's death, the pendent state claim appears to have been time-barred when filed. However, appellees have never raised this objection at any stage of this proceeding. Under California law, failure to raise a statute of limitations defense promptly constitutes a waiver of that defense. *Getz v. Wallace,* 236 Cal.App.2d 212, 213, 45 Cal.Rptr. 910 (1965); *Ridley v. Young,* 64 Cal.App.2d 503, 509, 149 P.2d 76 (1944) (failure to plead statutory bar in either demurrer or answer constituted waiver). It thus appears that, had this claim been filed in California court

originally, the statute of limitations objection would have been waived, and the California courts would hear appellants' claim.

On remand, the district court should determine whether California courts would have heard this claim if it were filed originally in state court. If so, it should entertain the state claims on remand.

V. Conclusion

The district court's decision to grant summary judgment on appellants' federal claims is reversed and remanded. The decision to dismiss the state claim is reversed

and remanded for reconsideration in accordance with this opinion.

REVERSED AND REMANDED.

APPENDIX C

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 93-15463
CT/AG#: CV-87-02470-SC

ORLEAN HOPKINS, individually; MELBA LAZENBY-JENKINS, as Administratrix of the Estate of Jerry Stancill

Plaintiffs – Appellants

v.

MARC ANDAYA; CITY OF OAKLAND, CALIFORNIA; GEORGE T. HART

Defendants – Appellees

(Filed Oct. 4, 1994)

APPEAL FROM the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered August 1, 1994

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORLEANS HOPKINS, individually; MELBA LAZENBY-JENKINS, as Administratix [sic] of the Estate of Jerry Stancill, Plaintiffs-Appellants, v. MARC ANDAYA; CITY OF OAKLAND, CALIFORNIA; GEORGE T. HART, Defendants-Appellees.	No. 93-15463 D.C. No. CV-87-2470-SC ORDER (Filed Sept. 22, 1994)

Before: FLETCHER and TROTT, Circuit Judges, and KING,** District Judge.

The panel has voted to deny the appellant's petition for rehearing and Judges Fletcher and Trott have voted to reject the suggestion for rehearing en banc and Judge King so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

** The Honorable Samuel P. King, Senior District Judge for the District of Hawaii, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX E

UNITED STATES CONSTITUTION, AMENDMENT 4. Unreasonable Searches and Seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

RULES OF EVIDENCE

Rule 403.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,

waste of time, or needless presentation of cumulative evidence.

Rule 404.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.